SUPREME COURT, U.S. FILED
DEC 3 1974
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

**No. 74-248**

UNITED STATES GYPSUM COMPANY,
*Petitioner and Defendant-Appellee-Cross-Appellant Below,*

*vs.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
*Respondent and Plaintiff-Appellant-Cross-Appellee Below.*

## PETITION FOR REHEARING.

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## PETITION FOR REHEARING.

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Petitioner, United States Gypsum Company (Gypsum), respectfully moves this Court for an order (1) vacating its denial of the petition for certiorari entered November 11, 1974, and (2) granting the petition in the above entitled cause. As grounds for this motion, petitioner states:

The primary question presented for decision of this Court under Gypsum's petition is whether a successor employer who, prior to and upon the acquisition of the assets of a business enterprise, expressly rejected the collective bargaining agreement negotiated with his predecessor is, nevertheless, bound by the provisions of said agreement.

The brief of United Steelworkers of America, AFL-CIO (Steelworkers) in opposition to Gypsum's petition indicates and

argues, however, that the arbitrator's awards in this case were a "make whole" remedy for refusal of Gypsum to negotiate with the Steelworkers and were sustained by the Court of Appeals on this basis. If weight was given to this contention the facts and argument upon which it is based are misleading and call for the following supplement to the statement of the case. The alleged refusal by Gypsum to negotiate with the Steelworkers found by the arbitrator was on the premise that Gypsum was bound by law to the provisions of the collective bargaining agreement. Gypsum at no time took the position that it would not negotiate with the Steelworkers if they represented a majority of its employees and the determining issue in this proceeding is not refusal to negotiate but whether Gypsum was bound by the collective bargaining agreement of its predecessor.

**SUPPLEMENT TO THE STATEMENT OF THE CASE.**

In pre-employment interviews held March 23 through March 26, 1965, with groups of two to eight employees of the predecessor employer, United Cement Company, Inc. (United), in which the local union officials participated, a representative of Gypsum stated that Gypsum was negotiating to purchase certain assets of United's plant, that if the purchase were consummated the labor contract with United would not be effective with Gypsum, that the check-off thereunder would end, that Gypsum, however, would recognize and negotiate with the Steelworkers if they represented a majority of the employees, that there would be new seniority rules, a new insurance plan, a new vacation plan, and new safety rules and if these individuals desired employment by Gypsum on this basis to fill out application blanks. The Steelworkers did not at any time request Gypsum to negotiate but on May 3, 1965 the Steelworkers' business agent inquired about delay in remitting April union dues under the check-off provision of the contract and was advised *inter alia* that Gypsum needed some evidence of the Steelworkers' repre-

sentative status. The business agent replied that a statement would be forthcoming. Instead, on May 18, 1965, the Steelworkers filed the grievance here involved. Answering this grievance by letter Gypsum again stated that it "stands ready upon request to negotiate a contract with any union representing a majority of its employees" and that Gypsum assumed that the Steelworkers would submit the statement of its representative status as indicated on May 3, 1965.

The Steelworkers were interested only in compelling recognition of the contract negotiated with United and without further contact with Gypsum filed an action to compel Gypsum to recognize that contract and comply with the provisions thereof including the arbitration clause. Gypsum then instituted proceedings before the National Labor Relations Board (Board) to ascertain the representative status of the Steelworkers which resulted in their decertification. The Steelworkers at no time requested that Gypsum negotiate except upon the assumption that the reopener in the contract bound Gypsum to negotiate thereunder on a wage increase and paid holidays. This reopener could not be exercised, however, until approximately ten months after the grievance was presented.

On the theory that Gypsum's refusal to honor the contract in the face of *Wiley* constituted a flagrant unfair labor practice the arbitrator ordered that the wage increase award to employees be made through the Steelworkers for the purpose of giving the Steelworkers the opportunity to tell their story and again organize the plant.

**ADDITIONAL REASONS FOR GRANTING THE WRIT.**

The arbitrator concluded that *Wiley*[1] bound Gypsum to the entire contract negotiated with United and rendered awards against Gypsum on the two provisions of said agreement which he found had been violated by Gypsum. Subsequently, this

1. 376 U.S. 543 (1964).

Court rendered its decision in *H. K. Porter*[2] reaffirming the fundamental national labor policy established by Congress of "private bargaining under governmental supervision of procedure alone, without any compulsion over the actual terms of the contract" and holding that the Board could not compel an employer to adopt a check off provision. This fundamental national labor policy was emphasized again by this Court in its decision in *Burns*,[3] holding that an order of the Board that Burns, a new employer, make whole its employees for losses suffered by reason of refusal to honor the contract of its predecessor could not be sustained. In this case the Court of Appeals, however, holds that the arbitrator can, consistent with the national labor policy, hold Gypsum bound by provisions of the collective bargaining agreement negotiated with United. Unless the Writ is granted this decision of the Court of Appeals will stand as authority for the anomalous proposition that under decisions of this Court the Board cannot hold an employer bound by contract provisions but that in an involuntary arbitration ordered in a Section 301(a) action an arbitrator can, as a matter of law, hold the employer bound thereby.[4] In such an arbitration the court delegates to the arbitrator a judicial function and the arbitrator is acting essentially as a special master.[5] If, in such an arbitration, an arbitrator can hold a successor employer bound by provisions of the contract with his predecessor, which the successor has not consented to, it logically follows that this decision is also authority for the prin-

2. 397 U.S. 99, 108 (1969).

3. 406 U.S. 272, 287 (1972).

4. See Frederick K. Slicker, A Reconsideration of the Doctrine of Employer Successorship, 57 Minn. L. Rev. 1051 at pp. 1097-1102; Charles G. Bakley, Jr. and James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, *27 Vanderbilt L. Rev., No. 1* (Jan. 1974), 117 at pp. 122-130.

5. A reference of a case for final decision on both law and fact requires the consent of the parties, *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1888).

cipal that, contrary to the fundamental national labor policy of private bargaining established by Congress, a court can do so.[6]

The decision of this Court in *Wiley* recognized the need for federal law to strike a balance between the rightful prerogative of owners independently to rearrange their businesses and some protection to employees from a sudden change in the employment relationship.[7] Although urged in that case to do so,[8] this Court stopped short of holding that a new employer was bound by the collective bargaining agreement negotiated with his predecessor. In enacting the NLRA (49 Stat. 449) Congress made clear that the Act did not compel agreements or permit governmental supervision of their terms.[9] In the debates on the LMRA (68 Stat. 136) Congress made clear its intention to reject the determination of terms of employment through compulsory arbitration.[10] If this Court permits the decision of the Court of Appeals in this case to stand, that Court will accomplish through the intervention of an arbitrator a result which this Court refused in *Wiley* and which is in direct conflict with fundamental national labor policy and the policy and the principle established by Congress that industrial peace is best promoted by protecting employees' rights through private collective bargaining (29 U.S.C.A. § 203(d)).

The fact that decisions under *Wiley* directing arbitration between a successor employer and his predecessor under the col-

6. See Lee C. Shaw and Philip V. Carter, Sales, Mergers and Union Contract Relations, 19 N.Y. Univ. Ann. Conf. on Labor, 357 at pp. 370-371.

7. 376 U.S. 543 at p. 549.

8. Brief of AFL-CIO as Amicus Curiae pp. 8-22, in 376 U.S. 543.

9. See *Porter Co.* v. *NLRB*, 397 U.S. 99, pp. 103-105.

10. Sen. Rep. 105, 80th Cong. 1st Sess. Part W, p. 1 (Apr. 22, 1947) and p. 28 (Apr. 17, 1947); H. Rep. No. 510, 80th Cong. 1st Sess. pp. 35, 62-63 (June 21, 1947) and pp. 100-102 (Apr. 11, 1947).

lective bargaining agreement negotiated with the predecessor have not resulted in arbitration proceedings except in rare instances does not minimize the impact of the decision in this case on industry. In every acquisition or transfer of a business enterprise the existence of a collective bargaining agreement negotiated with the predecessor is an important consideration. The fact that in such cases the parties have opted to negotiate a new contract rather than arbitrate under the old agreement demonstrates that it was their belief that their interests were better served by negotiation of a contract mutually agreeable to the parties rather than through arbitration. In these cases imposition of the old contract or provisions thereof was considered less desirable and might well be a disruptive influence in the labor relations of the parties.

The Congressional purpose and policy set forth in Section 1 of the NLRA (49 Stat. 449) and reaffirmed in Section 1 of the LMRA (68 Stat. 136) is to protect the right of employees to organize and to secure equality between employer and employees in bargaining.[11] The Board was created to supervise and oversee compliance with this purpose and policy. A fundamental policy under the statutes is freedom to contract.[12] If the decision of the Court of Appeals in this case is permitted to stand an arbitrator, and possibly the court in a Section 301(a) action, will have authority to bind a successor employer by the contract of its predecessor or portions thereof in violation of this fundamental national labor policy, and the balance sought in *Wiley* will be destroyed. In *Burns* this Court protected the employees from the result of the change in ownership by requiring that the new employer bargain with the collective bargaining representative who had negotiated a contract with the prior employer. No better principal of law for the protection of employees from a sudden

11. See also Seymour Swerdlow, Freedom of Contract in Labor Law: Burns, H. K. Porter and Section 8(d), 51 Tex. Law Rev. No. 1 (Dec. 1972) 1 at p. 21.

12. *Porter Co.* v. *NLRB*, 397 U.S. 99, pp. 107-108.

change of their employer has been devised which will not conflict with the fundamental principle of freedom of contract prescribed by Congress.

For brevity in its petition Gypsum stated in one sentence that the check off award was punitive in nature. This seemed obvious from the provision in the check off award denying Gypsum the right of reimbursement from wages of employees for their checked off union dues. The portion of the wage increase award directing that payment be made through the Steelworkers to give the Steelworkers an opportunity to explain their position and reorganize the plant is likewise punitive in nature and violates Section 8(a)(3) of LMRA (29 U.S.C. § 158(a)(3)). It is the general rule that an arbitrator cannot award punitive damages.[13] This Court has ruled that the Board cannot do so.[14] The decision of the Court of Appeals in this case conflicts with the principle of uniformity of law in actions under Section 301(a). It stands as authority that an arbitrator may award punitive damages. It may also be construed as authority that in a Section 301(a) action punitive damages may be awarded.[15] This aspect of the decision is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Local 127, United Shoe Workers* v. *Brookes Shoe Mfg. Co.*, 297 F.2d 277, 278-284 (1962) holding that punitive damages cannot be recovered in an action under Section 301(a) of the Act.

## THE IMPORTANCE OF THE PRIMARY QUESTION PRESENTED.

The decision in this case is of national importance. Its impact has a heavy significance in periods of recession, such as that now occurring, when financial conditions often generate the transfer,

13. Elkouri and Elkouri, How Arbitration Works, Rev. 2d pp. 257-258.

14. Republic Steel Corp. v. NLRB, 311 U.S. 7 at pp. 11-12.

15. See *supra*, pp. 4-5.

merger or reorganization of business enterprises. Any labor relations obligation created by federal law which is likely to deter employers from entering into such a transaction is of national importance and deleterious to employers, employees and industry alike. A new employer may not desire to be bound by the collective bargaining agreement negotiated with his predecessor. He may desire to select his own employees, assign their work and not be bound by the seniority provisions of the predecessor's contract. He may desire new vacation plans and fringe benefits. He generally will hesitate to be involved in his predecessor's labor problems. He may desire to fix his own initial wage rates and terms of employment, as he may lawfully do under *Burns*,[16] but if this decision of the Court of Appeals stands, he cannot do so without running the risk of an unfair labor practice if the union takes appropriate steps to compel arbitration and the arbitrator should hold that the new employer is bound by any of the provisions of the prior contract which conflict with his initial terms of employment[17] That this case does not affect only Gypsum, but is important to industry generally, is demonstrated by the fact that the Chamber of Commerce of the United States of America, Amicus Curiae, supports Gypsum's petition. While the brief of the Amicus Curiae supporting the petition urges *inter alia* overruling *Wiley*, the primary objection of the Amicus Curiae to the decision of the Court of Appeals in this case is its holding that an arbitrator, and possibly a court, may compel a successor employer to adopt provisions of the contract of his predecessor. The importance of the primary question presented in Gypsum's petition for the writ of certiorari is further emphasized by the numerous articles in legal publications, services and trade journals discussing the uncertainty of the obligations of a new employer under the collective bargaining agreement of his

16. 406 U.S. 272 at pp. 294-295.

17. See Charles G. Bakaly, Jr. and James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, *27 Vanderbilt L. Rev No. 1* (Jan. 1974) 117 at pp. 128-129.

predecessor because of the conflict between the respective principles of federal law underlying *Wiley* and *Burns*.

## CONCLUSION.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari and Brief of the Amicus Curiae, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL.**

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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**CERTIFICATE OF SERVICE.**

I hereby certify that on this 29th day of November, 1974, copies of the foregoing Petition for Rehearing were mailed postage prepaid to Michael H. Gottesman and Jerome A. Cooper, attorneys for the respondent. I further certify that all parties required to be served have been served.

HAROLD D. BURGESS,
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